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IN THE

Supreme Court of the United States

79543
Sup. Ct

OCTOBER TERM, 1947.

No. 242

JACOB MORRIS DANZIGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of your petitioner, Jacob Morris Danziger, presents this his petition for a writ of certiorari to review the final judgment of the Circuit Court of Appeals for the Ninth Circuit, rendered the 23rd day of April, 1947, affirming the judgments of the United States District Court in and for the Southern District of California, Central Division. [R. 1859.]

The said Circuit Court of Appeals judgment was entered upon the consolidated appeal of your petitioner and two co-defendants to-wit: Trinidad International Petroleum, Limited, a Nevada corporation; and Wake Development Company, a Delaware Corporation. The said Circuit Court of Appeals reversed the judgments of conviction as to said corporate appellants.

Statement of the Case.

The indictment [R. 2-66] charges petitioner with four classes of offenses, to-wit:

A. Counts I to VII, inclusive, charge separate violations of Section 17(a)(1), Securities Act of 1933, 15 United States Code, Section 77q(a)(1).

B. Counts VIII to X, inclusive, charge separate violations of Section 5(a)(2), Securities Act of 1933, 15 United States Code, Section 77(e)(2). (Defendants were acquitted as to these four counts.)

C. Counts XII to XVI, inclusive, charge separate violations of Section 215, Criminal Code, 18 United States Code, Sec. 388 (Using Mails to Promote Fraud).

D. Count XVII charges a violation of Title 18, United States Code, Section 88, in that defendants in the Central Division of the Southern District of California conspired to commit offenses against the United States by violating the aforesaid statutes; and that pursuant to said conspiracy, committed certain specified overt acts at Los Angeles, California. Each of the several counts of the indictment allege that the offenses therein charged were committed in the Central Division of the Southern District of California.

The indictment was returned December 30, 1941, but none of the defendants were arraigned until December 11, 1944 when petitioner and a co-defendant, Willard E. Warren, indicated as Warren C. Carter were brought into court and required to plead. [R. 73.]

Motion in behalf of petitioner for dismissal for want of prosecution was presented and denied. [R. 73.]

Trial was set for the 16th day of January, 1945, before a visiting judge from the State of Oregon. [R. 77.]

The only parties brought to trial were petitioner and the two corporate defendants. Save as to said defendants brought to trial, the case was dismissed as to all defendants other than Carter before January 16, 1945 [R. 396] and as to defendant Warren (Carter) counts 1 to 16 over objection of petitioner was dismissed on January 16, 1945. [R. 392.]

Summons against the corporate defendants were not issued until January 4, 1945, on which date the trial judge directed the two corporate defendants to appear for pleading on January 16, the date set for trial. [R. 74-75.]

The return on service of said citation was had by leaving them with a stenographer in the office of petitioner. [R. 79.]

Although no one purported to appear for the corporate defendants, the judge ordered that pleas of not guilty be entered on their behalf [R. 388] and directed petitioner's attorney to act as their counsel despite his protestations of lack of authority to do so. Petitioner's attorney specifically objected to the appointment on the ground that there would be a manifest conflict in interest, to which objection the court replied that the appointment was subject to developments at the trial which may cause counsel to believe that the interests of the several defendants were adverse. [R. 393-394.]

On the previous day petitioner's counsel had served upon counsel for the government and lodged with the court, an affidavit for a continuance of date of trial, which affidavit for continuance was read by the court on January 16, 1945. [R. 379-381.] Copy of this affidavit

appears at pages 4-11 of the Supplemental Transcript of Record.

It may not be amiss to present these salient factors. The properties of the Trinidad International Petroleum Company were situated in Trinidad, British West Indies. [R. 1646-50.]

The company's title papers were in London, England. [R. 1655-6.]

The alleged conspiracy was reputed to have been formed prior to 1935 in the City of New York. [R. 573.] An escrow involving the sale of the Trinidad International Petroleum shares of stock personally owned by defendant Wake Development Company had been opened in Wilmington, Delaware. [R. 1084.] The stock issued to Wake Development Company is admitted by the government to have been issued prior to the enactment of the Securities Act. [R. 1797.]

In each count of the indictment the falsity of the scheme therein charged and likewise the reputed misrepresentations claimed to have been intentionally made by all of the defendants, was specifically charged, and repeated by allegations denying the bona fide character of the scheme.

Petitioner's unanticipated sudden arraignment following a delay of three years subsequent to the return of the indictment, was necessarily confronted with the situation precipitated by the state of war then existent. The corporate papers were lodged in London, England, and material witnesses located at then inaccessible points, namely, in Trinidad, British West Indies, London, England, Sicily, France, etc. Accordingly petitioner caused to be

filed the affidavit for continuance hereinbefore referred to. The trial judge acknowledged that he recognized the serious position of petitioner by reason of the recent arraignment, and indicated that if he were in his own District of Oregon he would not be faced with the difficulty presented by reason of the matters and things set forth in the affidavit for continuance, but because the senior judge of said District Court had set the case for trial, the court was disposed with *mental reservations* to direct the trial to proceed subject to future developments as to what effect the unavailability of the evidence and witnesses would disclose. [R. 383-386.] The court having in effect ruled that he would proceed subject to disclosures as the case unfolded, in turn precipitated a situation where petitioner's counsel declared "that if he were *'obliged to try the case,'* he would waive a jury." [R. 392.] Thereupon a written form of waiver required in the District, which among other things contains a declaration that counsel has advised the defendant thoroughly respecting his rights, was presented to petitioner. [R. 393.] Petitioner's counsel by reason of the trial judge's pronouncement that he proposed to proceed with the trial subject to "subsequent developments," directed petitioner to sign written waiver but declined to sign the waiver in behalf of the corporate defendants. [R. 394.]

The trial then proceeded to the court without a jury.

The indictment had confessedly been procured on hearsay; no witness having any contact with the defendants on trial and knowledge of facts having appeared before that body. [R. 998-999.] An investigator upon whose testimony the indictment had been procured had obtained from petitioner a great number of documents and files

relating to the business of the two corporate defendants. This maze of documentary data was admitted into evidence with no foundational background other than the bald fact that they had been procured from petitioner, the trial judge indicating it was all that he required. [R. 939.] When petitioner's counsel endeavored to request an opportunity to inspect the documents before they were received, the trial judge directed petitioner's counsel to state his objections, examine the exhibits later, and add to his objections if he saw fit. [R. 646-648.]

It was flagrantly apparent from the outset that government's counsel was not privy to the nature, character or time of the formation of the purported conspiracy. When asked by the court at an early stage of the trial, government's counsel indicated that it was formed prior to 1935 but this generalization was *all* that was presented. [R. 573.]

It was only after the government had rested its case and after there had been received in evidence some 112 exhibits comprising thousands of pages, that the trial judge for the first time made inquiry of government's counsel as to the nature and character of the charges against the defendants on trial. Government's counsel thereupon informed the trial judge that the defendants were on trial for violations of the Securities Act of 1933, and Mail Fraud Conspiracy, and that the charges were identical in character. [R. 1537-1540.]

The trial judge had in the early stages of the proceeding asked the government's counsel whether he intended to call Warren (Carter) as a witness. It was indicated that the government had such intention but that they

could not attempt to inform the court as to what he would testify to. [R. 774-776.]

Before the latter inquiry, the trial court had declared to petitioner's counsel that if he contended under the law of evidence that Warren (Carter) could not take the witness stand and testify he was petitioner's agent, the court and counsel were in complete disagreement. [R. 771-773.]

No witness was produced at the trial who purported to have had any direct transaction with petitioner other than Willard Eugene Warren, indicted as Warren C. Carter, who had entered a plea to Count 17 prior to January 16, 1945.

In fulfillment of the trial judge's pronouncement that the said witness could take the stand and testify he was the agent of petitioner, the mass of documentary evidence previously mentioned was received as evidence with no foundation other than the fact as previously disclosed that the files upon request had been turned over to the Securities Exchange Commission.

The Government's case is altogether grounded on Warren's testimony.

When he took the stand the trial judge gave the said witness, carte blance to relate a pot-pourri of his personal peccadillos.

The undisputed evidence is that petiioner, a resident of the City of Los Angeles for sixty (60) years and a member of the bar of California for forty (40) years [R. 1637-1638], had left Los Angeles for the purpose of leaving for England where he was to complete pending negotiations for the financing and drilling of Trinidad Oil properties in England. [R. 1653-1654, 1068, 1078.]

The only contacts shown to exist in the record evidence between petitioner and the said Warren are the following:

Petitioner saw him in New York several times in 1935 and the only other occasion was in 1937. [R. 1274.]

Warren was never confessedly in Los Angeles before his meeting with defendant until his arraignment for trial in 1944. [R. 1281.]

Over repeated objections in behalf of petitioner and his co-defendants, Warren was permitted to assert that he had "written" the Wake Development Company: in no instance was any foundation laid as to the actual contents of these writings, nor evidence presented respecting the mailing thereof, the person who received them, or any purported reply thereto.

The panaroma of events testified to by Warren revealed the following:

In the summer of 1935 he met petitioner in New York. Petitioner informed him that he was interested in getting sufficient monies for expenses to go to England where negotiations were pending to finance actual oil drilling operations at Trinidad. [R. 1068, 1078.]

First Deal: The evidence in regard to the so-termed conspiracy discloses that petitioner discussed with Warren the sale to some former stockholders of a South American and All American Petroleum Companies, which companies had prior interests in the Trinidad Company holdings, and Warren was to call upon these stockholders in New York and to attempt to sell them some of the Wake Company's International Petroleum shares. The transaction did not involve use of the mails, and admittedly involved the sale of securities not subject to the

Security Exchange Commission regulations. [R. 1031, 1041-1042.]

Warren reported that his personal calls on these prospects was ineffective. [R. 1049-1050.]

SECOND DEAL: The second arrangement, after a few preliminaries, brought into the transaction a Mr. Palmer and a Mr. De Hart. The latter were officers of the Great Eastern Gas Company, a corporation who entered into an agreement with the corporate defendants for oil drilling operations, and letters were to be sent from the Wilmington, Delaware office to their stockholders and replies thereto to a postoffice box in New York. [R. 1051-1055.] This so-termed conspiracy was terminated by a subsequent arrangement, to wit:

THIRD DEAL: In the third transaction, an escrow was opened in the State of Delaware between J. H. Dube and Company and the Wake Development Company involving the sale of 20,000 shares through said escrow. [R. 1084-1085, 1673.]

In this third transaction, the Great Eastern Gas Company were to circularize their stockholders and the Wake Development Company was to do nothing but receive their share of the proceeds. [R. 1680.]

Petitioner left New York and arrived in Southampton, England, on September 19, 1935. [R. 1720.] All arrangements previously formed were cancelled at the direction of petitioner from England on October 14, 1935. [R. 1682.]

Petitioner thereafter had no transactions and remained in England until July 12, 1937. [R. 1721.]

FOURTH DEAL: Warren's testimony discloses that a fourth arrangement was made in which he was assertedly advised from England through letters to communicate with the Wake Development Company in Los Angeles for details respecting any further transactions. [R. 1090.] The record is silent as to the nature, character or parties involved in this fourth arrangement, while petitioner was in England.

FIFTH DEAL: The record discloses that a fifth arrangement was made while petitioner was in England. Warren produced no documentary evidence, but testified he "wrote to petitioner" that he was going to Canada to make arrangements with a broker in Canada.[1] Warren, in one of the few instances where an objection was sustained, was prevented from disclosing his conversations with the broker in Canada, but the evidence reached a point where it could be inferred that some Canadian brokerage firm had circularized certain stockholders in a Canadian Mining Company. [R. 1091.]

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[1]The Government failed to follow up the arrangements made by Warren in Canada, it is not disputed that he did make two trips to Canada on his own motion, but what arrangements were there made were never revealed, and the parties to this Canadian transaction were not identified.

This is very material for the reason that in every count contained in the indictment to which evidence was addressed, save and except Counts 12 and 13 which are hereinafter presented as the *Seventh Deal,* and Count 15 to which the Government's counsel in appellee's brief (page 48) concedes and confesses error involved representations made by Warren and some of his personal representatives that they represented Canadian interests as distinguished from the defendants on trial.

Moreover, at no time during the trial was any evidence elicited that Warren and his personal agents were not indeed representing such interests. Nor were the bona fides of Warren representations ever claimed by him in his testimony to have been untrue.

SIXTH DEAL: The record evidence then presents on the eve of the petitioner's return to the United States in 1937 the Sixth arrangement which brought into the activities of Warren, a Mr. Robins and a Mr. Shaffer who had made a transaction with a Mrs. Parsons confessedly in the absence of Warren or petitioner, or any of his co-defendants. [R. 1103-1107.]

There is no evidence that petitioner discussed or entered into any transaction with Warren upon his return to New York in 1937 respecting any transaction *in futoro.* [R. 1122-1124.]

SEVENTH DEAL: This transaction by Warren with a Dr. Hazelton of New Jersey [R. 1184] was at the solicitation of a New York brokerage firm. (A. S. Phelps.) The deal was between Phelps and Warren. [R. 1188-1190.] Dr. Hazelton executed a power of attorney to Warren. Petitioner and his co-defendants were charged with having mailed a letter to Dr. Hazelton which Warren claims he sent on here to be remailed. [R. 1209.] No evidence was presented which intimates that the contents of this letter was ever known by the defendants or that they had anything to do with this mailing.

THE PARSONS TRANSACTION: The nexus of Counts 1 and 15, and the overt acts which compose Count 17 pertain to a transaction with Elizabeth D. Parsons of Pottsville, Pennsylvania, in 1940. No witness was brought forth to testify by whom and in what manner the 1940 transactions were consummated.[2]

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[2]Appellee in its brief (page 48) in the Circuit Court confessed error in regard to Count 15. This, in legal effect, strikes Counts 1, 15 and 17. All pertain to the 1940 Parsons transaction.

In the Court 2 transaction, Warren represented to a person therein involved that he was a representative of a Canadian company. [R. 1125-1126.]

In the Court 3 transaction, he similarly represented that he was representing the Canadian company. [R. 1134-1135.]

In the Court 4 transaction, Warren likewise represented that he represented Canadian interests. [R. 1140-1141.][3]

In the Count 5 transaction, Warren represented to the parties involved that he represented Canadian interests. [R. 1151.] He said he sent an associate named O'Brien, whose hearsay was reported back to him which testimony forms the background supporting Count 5.

In the Count 6 transaction, Warren told the party involved that he represented Canadian interests. [R. 1162-1163.]

Count 7 was dismissed on motion of the Government at the time of trial. [R. 1639.]

The Count 8 transaction involved representations by Warren that he was representing Canadian interests. [R. 1171-1172.]

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[3]On direct examination by Government's counsel of Warren [R. 1146] the following was developed:

"Q. By Mr. Lucas: All right. Now, you have been using the name South McKenzie Island Mines in this transaction with Mr. Russell; had you prior to this time mentioned that company to Mr. Danziger? A. No, I can't say that I did. I can't recollect that I did although I may have.

Mr. Rose: I move that the latter part be stricken.

The Court: Motion denied."

It was contended in the Trial Court and the Circuit Court of Appeals that only one conspiracy was charged, and that the proofs offered respecting the various counts charged in the indictment, were not the type and form of conspiracy charged in the indictment, but were the personally assumed transactions by Warren and some of his aides without disclosure to the defendants on trial as to their representations with manifest lack of authorization on the part of any of the defendants brought to trial. [R. 106-110.]

In its opinion, the Circuit Court of Appeals expresses the view that by reason of the Trial Court having denied the continuance conditionally subject to developments during the trial, that the evidence unavailable might be important and, "That it is the kind of thing that can't be passed on in advance evidence," that it was incumbent upon petitioner to request a continuance at some undisclosed subsequent stage of the proceedings.

In this behalf, petitioner submits the record shows that when defense counsel endeavored to canvas the judicial mind at a point one and one-half pages before the Government rested, to wit: [R. 1398], the trial judge emphatically declared: "I am not answering any questions."

The court pushed petitioner's counsel to finish the case without expressing any views. [R. 1793.]

The Circuit Court is in error respecting the failure on the part of petitioner's counsel to call the trial judge's attention to the difficulties by reason of the failure to grant the continuance, as is fully supported in the record. [R. 1526-1527 and 1819.]

The Government at the time of trial, having produced no evidence whatsoever to support the specific allegations

of lack of *bona fides* of the Trinidad Petroleum Company insisted that the entire deal was seeded in fraud. [R. 1832.]

The trial judge intimated that the figures respecting the expenditures made by the Trinidad International Petroleum Company was a typographical error. [R. 1439.]

It was facetiously stated to Government's counsel that it was not *shares* of stock that had been issued in the amount of 7,500,000, but *dollars*. [R. 1479-1480.]

At the conclusion of the trial, the court struck the registration counts. [R. 1809.]

The court found your petitioner and the two corporate defendants guilty on Counts 1, 2, 3, 4, 5, 6, 12, 13, 14, 15, 16, and 17 as charged in the indictment. [R. 1837.]

At various appropriate stages in the proceedings in the Trial Court, petitioner challenged the constitutionality of the proceedings, and contended them to be in contravention of due process as follows:

1. Motion to dismiss indictment. [R. 68.]
2. Motion to quash the indictment on the ground that the same was procured contrary to the laws of the United States, in violation of the constitutional provisos, namely, due process and equal protection of the law. [R. 1419.]
3. That the indictment had been procured solely on hearsay testimony of Allen G. Mainland who confessed that he had no personal knowledge in respect to the matters to which he testified. [R. 973-1002.]
4. Motion for continuance. [R. 383-385 and 387.]
5. Motion for new trial. [R. 135.]
6. Motion in arrest of judgment. [R. 140.]

The trial judge indicated that he wanted a complete record to be printed, including all the exhibits. [R. 172.] All stipulations entered into by Government's counsel and petitioner's counsel were rejected by the trial judge. [R. 672.]

Exhibits received in evidence consisting of thousands of pages, were all ordered by the trial judge the day after both sides had rested in evidence "for all purposes." [R. 1811.]

The Circuit Court admitted petitioner to bail after refusal by the trial judge. [R. 1842.] The Circuit Court ordered the exhibits to be considered in their original form on appeal. [R. 1848.]

Before the Circuit Court of Appeals, there were thirty-five assignments of error comprising 202 pages of record and four additional points in the statement upon which petitioner relied on appeal. [R. 175-377 and 1844-1845.]

In its opinion, the Circuit Court of Appeals failed to consider any of the assignments other than Assignment I; refusal to dismiss the indictment for want of prosecution [R. 175], and Assignment IV, motion to quash return of service on the corporate defendants. [R. 176.]

Only two of the additional points, denial of motion for continuance and appointment of petitioner's counsel for corporate defendants were considered by the said court. [R. 1844-1845.]

The Circuit Court of Appeals erroneously invoked and applied Act of 1919 (28 U. S. C. 391), in holding the

record disclosed no error which affected the substantial rights of petitioner.[4]

In its opinion, the Circuit Court of Appeals failed adequately to consider the effect of the denial of petitioner's motion for a continuance. It was only after the rendition of the decision that it became apparent that the Circuit Court and appellee's counsel were not considering the affidavit [Supp. R. 4-11] that had been filed in support of the motion for continuance. The supplemental transcript of record [R. 1-3] reveals what brought about the overlooking of the importance and significance of this motion, and the stipulation that the same was *overlooked by the Government* is reflected. [Id. 11.]

Opinion of the Court Below.

No opinion was rendered by the District Court in this case.

The opinion of the Circuit Court of Appeals was handed down on the 23rd day of April, 1947. It appears in the record at page 1853 and officially reported in 161 F. (2d) 299.

Jurisdiction.

The jurisdiction of this court is invoked under Judicial Code, Section 240(a); 24 U. S. Code, Section 347(a).

Judgment of the Circuit Court of Appeals below was entered on April 23, 1947. The court below denied a petition for rehearing, filed within time allowed therefor on July 8, 1947. [R. 1860.]

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[4]It is not contended that the entire record was ever reviewed by the Circuit Court. On the occasion of oral argument, the said Court made it clear it had no such intention and struck the Government's brief directing a new one to be filed. [R. 1851.]

Specification of Errors.

The petitioner relies upon the specification of errors below [R. 175-377]; the five additional points in the statement upon which the petitioner relied upon appeal [R. 1844-1845]; and on the errors assigned in his petition and supplemental petition for rehearing. [R. 1860.] (The nature of the specification of errors is suggested by our statement of "Questions Presented".)

Questions Presented.

1. Can it be contended that a defendant charged with a number of criminal offenses in a District Court of the United States has been afforded due process and the kind and character of trial contemplated by the provisions of the Constitution of the United States amendments, Arts. V and VI—

(a) When the defendant was indicted by a grand jury drawn from a panel improperly chosen (according to *Ballard v. United States of America,* 91 L. Ed. 195);

(b) When the indicted defendant was not arraigned for almost three years subsequent to the return of the indictment;

(c) When the defendant on the date set for trial is required to join in his defense with two corporate defendants who had never been brought into court or arraigned, or afforded an opportunity to plead;

(d) Where the defendant's counsel, over objection and protest, is appointed to represent the two co-corporate defendants;

(d) Where confessed vital and material evidence by witnesses located in foreign places is unavailable to the defendant by reason of sudden arraignment and setting for trial after 3 years' delay, and continuance denied subject to developments during trial which necessarily compelled the defendant to waive trial by jury under the circumstances;

(e) Where the trial judge received into evidence a multitude of documents purporting to reflect action on the part of the two said corporate defendants, without any foundation other than that they had come into the hands of the Government upon request to an officer of the corporations;

(g) Where the trial court admits into evidence the declarations of a former co-defendant on the theory that he can testify that he was the agent of the defendant on trial, when it is established that they have not met or spoken to each other in years, and where no knowledge or privity is shown, save and except that the said witness contends that he "wrote" to the corporation of which defendant was an officer, without disclosing the contents, a copy, or such fundamentals, showing mailing or receipt of such purported communications?

2. In the prosecution of crimes requiring knowledge on the part of a defendant, may a trial judge bind an accused to account for unauthorized declarations made by a person in the absence of, any proof of, authorization, ratification or acquiescence?

3. Where an accused is charged with seventeen specific offenses, some of which are, and are not, offenses

involving moral turpitude, and where the latter element results in his disbarment, be bound by a Circuit Court of Appeals' decision that he is probably guilty of some count without disclosing, *which,* of the seventeen counts, on the theory that the accused's punishment is not effected, without regard to the point of whether his substantial rights have been violated and abrogated?

4. May an accused be charged with a particular and specific single conspiracy, and at the time of the trial be bound by the acts of numerous persons shown to be not in privity with him in at least six or seven unrelated and separate conspiracies to which he is not a party?

5. Did the Circuit Court below erroneously construe the holding of this Honorable Supreme Court in the case of *Glasser v. United States,* 86 L. Ed. 681, in contending that it was incumbent upon petitioner to establish HOW he was prejudiced by having his counsel over protest and objection, appointed to represent two co-defendants whose acts and deeds were charged to petitioner?

Reasons Relied on for Allowance of Writ.

The decision of the Circuit Court of Appeals presents the following points calling for a review by this court:

A. The court erred in failing—

(1) Adequately to consider the petitioner's assignments of errors [R. 175-377], and the statement of points relied on in the Circuit Court, numbers 1-5. [R. 1844-1845.]

(2) It also failed to pass on any of the assignments other than heretofore specified.

B. Where the Circuit Court erroneously invoked and applied the Act of 1919 (28 U. S. C. 391) without indicating that the entire record had been considered and based its affirmance on the ground that the petitioner's *punishment* was not affected by disregarding whether his substantial rights were violated and abrogated, can it be said petitioner was not denied due process?

C. The Circuit Court of Appeals has failed to apply, or plainly misinterpreted, an authoritative Supreme Court decision, to wit: the case of *Glasser v. United States,* 86 L. Ed. 681, in holding that it was necessary on the part of petitioner to indicate the precise degree of prejudice sustained by him as a result of the court's appointment of counsel to represent the two corporate defendants.

D. The Circuit Court of Appeals erred in failing to apply the authoritative Supreme Court decision of *Ballard v. United States,* 91 L. Ed. 195, when it refused to quash the indictment by reason of the manner in which it had been procured.

E. Apart from the specific repudiation of the holding in the *Glasser* case, the instant case presents questions of importance in the general Federal Criminal Law and in the administration of justice.

There is a seemingly unprecedented situation in this case where a trial judge admits that he is reluctant to proceed by reason of the showing made for a continuance and appointment over objection of counsel to represent co-defendants, conditional and subject to disclosures as the trial unfolds.

While it is possible to view such proceedings before a judge without a jury, would such judicial pronouncement

not be expected to provoke the defendant as it did in this case to waive right to trial by jury?

F. The decision of the said Circuit Court of Appeals, by holding and countenancing the mode and manner of trial reflected in the "statement of the case and questions presented" (*ante*) sanctions such a departure by a lower court as to call for an exercise of this court's power of supervision.

G. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter. The decision in the instant case is believed to be in conflict with the decision in the case of *Tinsley v. U. S.* (C. C. A. 8), 43 F. (2d) 890.

H. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter, to wit, *Wyatt v. U. S.* (C. C. A. 3), 23 F. (2d) 791.

I. The Circuit Court of Appeals has rendered a decision in conflict with its own previous decision in *Levine v. U. S.*, 79 F. (2d) 364, wherein it held that conversations and transactions by alleged co-conspirators not authorized were not competent evidence.

J. The Circuit Court of Appeals rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the subject of direct proof of mailing, to wit: the case of *Brady v. U. S.* (C. C. A. 8), 24 F. (2d) 399.

K. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit

Courts of Appeals on the same matter, to wit: *Freeman v. U. S.*, 20 F. (2d) 748.

L. The Circuit Court of Appeals has rendered a decision antithetical to its recognition of the holding by this court in the case of *Kotteakos v. U. S.*, 66 S. Ct. 1239, as reflected in its opinion in *Canella v. U. S.* (C. C. A. 9), 157, F-2, 470, Sept. 1946, in respect to the subject of variance of proof.

M. The Circuit Court of Appeals has rendered a decision probably in conflict with applicable decisions of other Circuit Courts of Appeals respecting the effect of the reversal as to two of three defendants brought to trial on a charge of conspiracy as per the case of *Feder v. U. S.* (C. C. A. 2), 257 Fed. 694.

Throughout the trial, the trial judge seems to have acted arbitrarily. From his own declarations, it is reasonable to infer that he was unfamiliar with the elements requisite to establishing the *corpus delicti* of the offenses charged in the indictment; that he was misled by misinformation on the part of trial counsel for the Government.

This court has jurisdiction in the exercise of its broad appellate jurisdiction. Circumstances here revealed are unusual and probably unprecedented.

This Honorable Supreme Court has previously held that upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. (*Glasser v. U. S.*)

If our cherished constitutional rights are to be preserved and if our established principles of law are not to be emasculated, the situation presented in this petition

appropriately calls upon this Honorable Supreme Court for assumption of jurisdiction.

Wherefore, petitioner prays that this court grant a writ of certiorari and thereafter order the judgment below reversed, or in the alternative, remand the cause for a new trial.

Respectfully submitted,

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Attorney for Petitioner.

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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 242

JACOB MORRIS DANZIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1853–1858) is reported at 161 F. 2d 299.

JURISDICTION

The judgment of the circuit court of appeals was entered April 23, 1947 (R. 1859). A petition for rehearing was denied July 8, 1947 (R. 1860). The petition for a writ of certiorari was filed August 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether an indictment must be dismissed for failure to summon women as grand jurors, although no motion to quash on such ground was made.

2. Whether a motion to dismiss for want of prosecution, made after the cause was set for arraignment, was properly denied.

3. Whether it was an abuse of discretion to deny a motion for continuance subject to developments at the trial.

4. Whether petitioner was prejudiced by the appointment of his counsel to represent two corporations which he controlled.

5. Whether it was proper to introduce records of a corporation controlled by petitioner which he had produced and identified before the Securities and Exchange Commission.

6. Whether testimony concerning the acts of a codefendant who testified for the Government was properly received against petitioner.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or

artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

The Securities Act of May 27, 1933, c. 38, Title 1, 48 Stat. 74 (15 U. S. C. 77a *et seq.*), provides in part:

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud * * *

* * * * *

SEC. 24. Any person who willfully violates any of the provisions of this title

> * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On December 30, 1941, an indictment in 17 counts was returned in the United States District Court for the Southern District of California against petitioner, several individual codefendants, and two corporations (R. 2–66). The first seven counts charged separate violations of Section 17 (a) (1) of the Securities Act by the use of a scheme to defraud in the sale of securities in interstate commerce (R. 2–41); counts 8 to 11 charged violations of Section 5 (a) (2) by the mailing of unregistered securities (R. 41–52); counts 12 to 16 charged separate violations of the mail fraud statute (R. 52–62); and count 17 charged conspiracy (R. 62–66).

On November 20, 1944, petitioner was brought before the court for arraignment, and the cause

was continued for that purpose (R. 67).[1] Thereafter, petitioner filed a motion to dismiss for failure to prosecute in the three-year period following the return of the indictment (R. 68–72). That motion was denied (R. 73), and a trial ordered (R. 77). Petitioner filed a motion for continuance in which he referred to the three-year delay in arraigning him and alleged that he needed time to get depositions of witnesses in Trinidad and London who would testify to the fact that Trinidad International Petroleum, Ltd., one of the corporations named in the indictment, owned property whose "potential value" was great (Supp. R. 4–11). The court denied the motion and ordered the trial to proceed, stating, however, that the action was taken with the mental reservation that developments at the trial might show the need for a continuance, but that such matters could not be determined in advance (R. 385–386).

Summonses had been issued against the corporate defendants on January 4, 1945 (R. 78–79, 80–81), and service was made by leaving a copy with petitioner's secretary (R. 79, 81). At the opening of the trial, petitioner, through his attorney, disclaimed any authority to appear for the corporations (R. 380). The court indicated it

[1] The record shows that Warren C. Carter, a codefendant who subsequently pleaded guilty (R. 77–78) and testified for the Government (R. 1025), was not apprehended until October 20, 1944 (R. 1263). Two other codefendants had not been apprehended at the time of the trial and the case was dismissed as to them (R. 396).

would appoint petitioner's attorney to represent the corporations (R. 382, 387). The attorney stated that he felt that it was his duty to object since it was possible that the interest of the corporations would conflict with his duty to petitioner (R. 387–388). The court did, however, appoint petitioner's attorney to represent the corporations "subject to developments at the trial that may cause you to feel that your interest has become adverse" (R. 388). The corporations were convicted and fined (R. 148–151), but their convictions were reversed on appeal on the ground that they had not been properly served (R. 1856–1857, 1859).

Petitioner's counsel waived trial by jury (R. 392–394). Both petitioner and his counsel signed a written waiver to such effect on behalf of petitioner personally (R. 394), but the court accepted an oral statement on behalf of the corporations in view of the circumstances under which the attorney was appointed to represent the corporations (R. 394). Petitioner was acquitted on the registration counts, count 7 was dismissed by the Government, and petitioner was convicted on counts 1 to 6 and 12 to 17 (R. 1837). He was sentenced to imprisonment for 15 months on each count, the sentences to run concurrently (R. 146–147). On appeal, the judgment was affirmed (R. 1859).

The evidence for the Government may be summarized as follows:

Petitioner was president of Trinidad International Petroleum Ltd., a Nevada corporation organized in 1933 (R. 672–673, 680). The corporation acquired certain oil rights in the Island of Trinidad, involving about 200 parcels of land originally owned by three individuals. These individuals had a lease contract with a firm known as the Standard Mining Company, and it in turn had a subcontract with one Rousse. Rousse assigned his rights to Trinidad. (R. 681–684, 688–689.) Trinidad issued a million shares of stock of which 500,000 remained as treasury stock. The other 500,000 were issued to the Standard Mining Company, and of that amount 165,000 shares were given to Wake Development Company in return for petitioner's services. (R. 692–693.) Wake was beneficially owned by petitioner's wife, although for a time the stock was carried in the name of petitioner's sister (R. 694–695). Petitioner was an officer of Wake and managed it from its inception (R. 694–695).

The instant prosecution is based on sales of the Trinidad stock owned by the Wake Development Company. Petitioner admitted that the proceeds obtained by such sales were used for his own living expenses and represented his chief source of income (R. 706–707, 824).

The principal witness for the Government was petitioner's co-defendant, named in the indictment as Warren C. Carter (R. 2), but whose true

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name is Willard Eugene Warren (R. 1025). He met petitioner in New York in the early part of 1935 (R. 1067) and agreed to sell Wake-owned Trinidad stock for petitioner, receiving one-third of the proceeds as commissions and one-third for expenses (R. 1067–1068). In general, the method of sale was to obtain lists of stockholders of defunct corporations and offer such stockholders a "credit" for their stock toward the purchase of Trinidad stock and Trinidad preferential profit-sharing notes. The stockholders would be given the impression that the Trinidad stock was worth $5 per share and that the profit-sharing notes could be sold at about $4.80, whereas, with the credit allowance on his old stock, he was paying only $3 in cash (R. 1030–1042, 1051–1055, 1126–1127, 1134–1135).

The methods employed by Warren and petitioner's participation therein are illustrated by the transactions which form the basis of particular counts.

While petitioner was in England from 1935 to 1937 (R. 1082, 1122), Warren, using the name Edwards, called on Mrs. Parsons, who lived in Pottsville, Pennsylvania (R. 1092, 1097). He made three sales of Trinidad stock to her, one for $500, one for $3,000, and a third for $4,000 (R. 1096–1097). In the course of these transactions, Warren showed Mrs. Parsons a copy of a London newspaper that had been sent to him by petitioner, who had written that Warren would know how

to use it in the sale of the stock (R. 1101). The paper listed a number of oil stocks on British exchanges bearing Trinidad in their names (R. 1101). Petitioner wrote from London that he would like to get over a nice sale, and that "The president will be glad to call on Parsons and explain the encouraging results to date." He enclosed a copy of a letter he had sent to Mrs. Parsons from London (Ex. 105, R. 1095–1096; see R. 1121–1122).[2] When petitioner returned from England in July 1937, he asked if it would not be possible to do something further in the Parsons matter (R. 1103, 1122). Warren stated that he had made too many visits and that a new personality should be injected (R. 1103). He told petitioner that he had arranged to have a Mr. Robbins represent himself as Mr. Winslow, petitioner's financial agent, who was offering a block of stock at prices substantially lower than they were being sold on the market (R. 1103–1104). Robbins brought Warren Mrs. Parsons' check to the order of A. R. Winslow for $7,000. The check was cleared through Wake and petitioner received $1,600 out of the proceeds (R. 1106). The transactions with Mrs. Parsons form the basis of count 1 of the indictment, the specific

[2] In his testimony before the Securities and Exchange Commission, petitioner at first denied corresponding with Mrs. Parsons (R. 806), but later admitted that he had written to her (R. 857). When he took the stand in his own behalf, he admitted writing to Mrs. Parsons from England (R. 1757).

mailing being a covering letter transmitting the Trinidad shares acquired in the latest deal (R. 14–15; Gov. Ex. 85, R. 874, 876).

In August 1939, Warren, using the name Edwards, called on a Miss Skinner, a stockholder in Great Eastern Natural Gas Co. (R. 547–549, 1150).[3] Warren told Miss Skinner that he represented a company which was interested in purchasing the Trinidad notes which he understood she held (R. 549, 1151). When she stated that she did not own any, he advised her to write to the Trinidad Company and see if she could not exercise her rights (R. 550–551, 1151–1152). He told her that the Trinidad stock was very good, and that it was listed on the London stock exchange (R. 551–553, 1151, 1152). Warren wrote a letter to Wake and told them to expect an inquiry (R. 1153). Subsequently, when Wake informed him that no reply had been received to the letter explaining the offer, Warren sent another salesman to call on Miss Skinner (R. 1155; see R. 559–560). Miss Skinner eventually did buy Trinidad stock, sending to Wake a cashier's check of a Farmingdale, New Jersey, bank, which was deposited to the Wake account and collected (R. 562). The collection of this check forms the basis for count 5 (R. 29–32).

A number of other counts of the indictment

[3] Miss Skinner testified for the Government, and her testimony corroborates Warren's (R. 547, ff.).

were based on sales of Trinidad stock to stockholders in Canadian mining companies—Mrs. Lawyer (count 2, R. 16–18; count 14, R. 57–59); Mr. Pitts (count 3, R. 18–20); Mr. Russell (count 4, R. 21–23); Mr. Smith (count 6, R. 33–37; count 16, R. 61–62). In each case, Warren approached the stockholder and stated that he represented a Canadian firm which was interested in buying the Trinidad notes which he understood the stockholder owned, stating that the shares had a par value of $5.00 and that the notes could be sold for approximately $4.80. When the stockholder denied having the stock, Warren would suggest that he write to Wake and exercise his rights. Warren would then write to Wake himself and tell them that an inquiry would be forthcoming. In each case, the sale of Trinidad stock was eventually made, although Mr. Russell attempted to cancel the transaction. (R. 1126–1127, 1134–1135, 1140–1147, 1163–1167.) In the case of Mrs. Lawyer, Warren had an interchange of correspondence with petitioner in which he advised petitioner not to accept her offer made on the understanding that she expected to resell the stock. The sale was not consummated until she wrote in a letter that she was accepting the Trinidad stock merely on its speculative merits. (R. 1127–1131; see R. 771–797.)

In June 1938, Warren, using the name Roberts, called on Dr. J. Arthur Hazelton, a dentist in

Mantua, N. J. (R. 450–453, 454, 1184).[4] Warren succeeded in getting Hazelton to exchange certain stock which he held in return for Trinidad stock (R. 451, 462–466, 1184–1889). Warren told Hazelton the Trinidad stock was listed on the London Exchange and that they had a concession from the British Government to dispose of the oil (R. 467). Hazelton received communications from Wake about the value of Trinidad stock (Gov. Exs. 24, 25, R. 474, 475).

In 1940, Warren wrote to petitioner, stating that he was going to try to make "a new deal" with Hazelton, and asked petitioner if he could furnish him with new material (R. 1198–1199). Warren called on Hazelton and told him that the Trinidad stock had not gone up as much as he had expected, but that he had every reason to believe that a block of shares was being taken over by a syndicate; that Hazelton's holdings were not adequate to enable him to participate, and that he ought to increase his holding for that purpose (R. 488, 499–500, 1206). Hazelton replied that he was unable to make any further investment, but he did agree to give Warren $700 to finance a trip to California and Trinidad to close the deal (R. 488–493, 1207). Hazelton sent a $300 cashier's check to Wake, in care of Roberts (Warren), and four postal money orders for $100 (R. 490–491). Warren wrote to petitioner that

[4] Dr. Hazelton testified for the Government and corroborated Warren (R. 449 ff).

he would receive the check and subsequently received a letter stating that the check had been deposited for collection (R. 1208). Warren, using the name Roberts, wrote a letter to Hazelton which he sent to petitioner to remail from California to reflect the fact that Roberts was in California. In the letter, Roberts reported that he was about to leave for the property in Trinidad (R. 1209; Gov. Ex. 34, R. 505). This letter is the basis of count 12 (R. 52–55), and the $300 check is the basis of count 13 (R. 55–57).

Petitioner testified before the Securities and Exchange Commission in connection with their investigation of his activities. He admitted that the Trinidad stock was not listed on any stock exchange (R. 705–706); that Trinidad has never qualified to develop its properties (R. 707); and that the property was not producing oil (R. 767–768). He admitted that he knew that the stock turned in for Trinidad shares was worthless (R. 726–727). He admitted writing to Dr. Hazelton (R. 750–751), but stated that he had never met Mr. Roberts and could not remember dealing with him (R. 753–754). He also said that he did not know a Mr. Edwards (R. 856, 863, 913). He testified about many transactions with Winslow and said that Winslow had obtained the list of Canadian mine stockholders (R. 710, 718, 730–731, 771).[5] He denied having any dealings with

[5] Cf. Warren testimony that Winslow was a fictitious person (R. 1103–1104).

Carman (Warren, known as Carter; see R. 721–722) or sending any funds to him after the summer of 1937 (R. 723–724, 839, 954, 955).

ARGUMENT

Without arguing any point in detail, petitioner raises a number of questions, none of which presents an issue of merit.

1. Although he made no motion to dismiss the indictment because of the failure to summon women as grand jurors, petitioner now argues (Pet. 17, 20) that the decision of this Court in *Ballard* v. *United States,* 329 U. S. 187, requires dismissal of the indictment. However, by the statute in effect at the time (18 U. S. C. 556a), petitioner's failure to move to dismiss the indictment within 10 days after his arraignment precludes him from having the indictment dismissed because of an irregularity in the impanelling of the grand jury.

2. The denial of petitioner's motion to dismiss for want of prosecution (see Pet. 17) was proper, since at no time in the three-year period following the indictment did petitioner seek to have a trial date set. *Daniels* v. *United States,* 17 F. 2d 339, 344 (C. C. A. 9), certiorari denied *sub. nom Appell* v. *United States,* 274 U. S. 744; *Pietch* v. *United States,* 110 F. 2d 817, 819 (C. C. A. 10), certiorari denied, 310 U. S. 648; *Phillips* v. *United States,* 201 Fed. 259 (C. C. A. 8); *Collins* v. *United States,* 157 F. 2d 409 (C. C. A. 9). The

record shows that the case was brought to trial very soon after the apprehension of Warren (fn. 1, *supra*, p. 5).

3. The denial of petitioner's motion for a continuance (see Pet. 18, 20) did not constitute an abuse of discretion. The trial judge made it clear that he would grant an adjournment if the need therefor was shown at the trial. The evidence adduced at the trial shows that the testimony for which the adjournment was sought—evidence designed to show the "potential value" of the Trinidad oil properties—was clearly irrelevant. By petitioner's own admission before the Securities and Exchange Commission, the potentialities of the property had never been realized. Those potentialities, if they existed, would in no way justify the selling methods disclosed by the evidence. It is significant that no motion for a continuance was made during the trial.

4. The action of the court in appointing petitioner's counsel to represent the two corporations (Pet. 17, 19, 20) did not prejudice petitioner. His own testimony before the Securities and Exchange Commission shows that the corporations were merely his alter ego. Furthermore, counsel never claimed a conflict of interest during the trial.

5. The contention that there was a variance between the indictment and proof as to the number of conspiracies proved (Pet. 19, 22) is frivolous. All the evidence adduced by the Government related to the manner in which petitioner, through

Warren, made fraudulent sales of Trinidad stock. The fact that different methods were used at different times does not constitute a variance.

6. The insinuations against the fairness of the trial judge (Pet. 6–7, 13–14, 15, 22) are wholly unwarranted, as appears from the record references which petitioner himself cites.

7. As to the admission of documentary evidence (Pet. 18), in view of petitioner's own statements that he managed Wake from its inception (R. 694–695), that his sister had authority to act on his behalf (R. 732, 824, 924), and that, after her death in September 1939, he handled all correspondence himself (R. 724, 751, 924), it is difficult to understand his contention that the Wake files which he himself produced before the Securities and Exchange Commission should not have been admitted against him. Furthermore, in petitioner's oral testimony before the Commission, he specifically identified a number of documents, including letters written to persons whose purchases of stock form the basis of individual counts (R. 750–752, 757, 759, 765, 771, 776, 780, 815, 825–828, 852, 855, 858, 896, 909, 919–920).

8. The argument that petitioner was improperly held liable for Warren's activities (Pet. 18, 21) is answered by the evidence as set forth in the Statement, *supra*. It is clear that petitioner knew of Warren's activities, that he assisted Warren by letters written to the persons to whom stock was sold, and that he adopted War-

ren's acts and received the proceeds thereof. The letters which petitioner identified in his testimony before the Securities and Exchange Commission in themselves amply establish his participation in the scheme proved.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

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